SUPREME COURT, U. S.

JUN 8 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

.....1967 Term

No. 230

FRED SORENSEN,

Petitioner,

vs.

WAYNE R. SWANSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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FRED SORENSEN,

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WAYNE R. SWANSON,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

—o—

Comes now Petitioner and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of Nebraska, the court of original jurisdiction of this quo warranto proceedings, to review the overruling on March 10, 1967, of motion for rehearing on the judgment and decree entered on January 27, 1967, determining that Relator was eligible to the office of Treasurer of the State of Nebraska, ousting Fred Sorensen, Respondent, from the office of Treasurer of the State of

Nebraska, and alleges, avers and complains in the following particulars:

A. Reference to official and unofficial reports of the opinion delivered in the court of original jurisdiction.

The decision and opinion of the Supreme Court in its original jurisdiction filed on January 27, 1967, in the case of Wayne R. Swanson, Relator, v. Fred Sorensen, Respondent, is reported in official Nebraska reports at 181 Neb. 312, 148 N. W. 2d 197. The order overruling the motion for rehearing on March 10, 1967, is not reported.

B. Jurisdictional Grounds.

The following is a concise statement of the grounds on which the jurisdiction of the court is invoked showing:

1. There is a Federal and Constitutional question of substance not theretofore determined by the Supreme Court as to whether a Republican form of government of the type under which the United States of America is governed must be based on three and only three departments of government, namely, Executive, Judicial, and Legislative.

2. There was a denial of due process of law of the Fourteenth Amendment as applied to petitioner in the instant case by virtue of the decision and judgment rendered by the Nebraska Supreme Court in that the due process and checks of the Constitution of Nebraska concerning executive office holders were not applicable to a member of the Nebraska State Railway Commissioner for the reason that the Railway Commission was decided

by the court to be not a part of the Executive, Judicial, or Legislative branches of the government of the State of Nebraska but was a separate department; that as a result, Relator was adjudged to be declared by the court not to be ineligible, under the provisions of Article IV, Section 2, of the Constitution of the State of Nebraska, to hold any other state office in the State Executive Department during the period for which he had been elected or appointed to the office of Railway Commissioner of the Railway Commission of the State of Nebraska.

C. Dates of judgment and decree sought to be reviewed.

The Supreme Court of Nebraska in the original action in quo warranto herein on January 27, 1967, decided that the constitutional provisions, by virtue of which the State Railway Commission was created, were made an independent part of the Constitution of Nebraska in that it was decided to be not a part of the Executive, the Legislative or the Judicial Departments under said Constitution; that as a result, the court decided that a State Railway Commissioner was not ineligible constitutionally to file for and to be elected and to hold and possess any other State office during the period for which he was presently serving as an elective Railway Commissioner, notwithstanding the fact that the compilers of the State Constitution saw fit and did place the pertinent provisions creating the State Railway Commission, Article IV, Section 20, entitled "Executive", Constitution of the State of Nebraska, under this general heading in connection with executive offices and officers of the State of Nebraska. On March 10, 1967, the Court overruled the Motion for Rehearing on said decision and judgment set

out in the Court opinion in the case of Wayne R. Swanson, Relator, versus Fred Sorensen, Respondent, Case No. 36570, Original, cited as 181 Neb. 312, 148 N. W. 2d 197.

D. Questions presented for review:

1. The question whether or not the Supreme Court of Nebraska's decision and judgment, entered in the instant case, to the effect that in adopting the Constitutional provision creating the State Railway Commission of Nebraska, said Commission was made an independent part of the Constitution of the State of Nebraska and not as an amendment to the Executive, Legislative, or Judicial Department Articles thereof, presents a novel federal question reviewable by Petition for Writ of Certiorari in the Supreme Court of the United States of America.

2. The question as to whether or not Petitioner was denied due process of law, under the Fourteenth Amendment of the Constitution of the United States of America, Sections 1 and 2, and under the Fifth Amendment to the Constitution of the United States of America by the decision and judgment of the Supreme Court of Nebraska, entered in the instant case, in which said Supreme Court determined and declared that Wayne R. Swanson, Respondent, who was a duly elected, qualified and acting Railway Commissioner of the State Railway Commission, prior to and at the date that he filed for nomination to said office of Treasurer of the State of Nebraska and including the date that he was sworn into and assumed the office of said Treasurer, was eligible as a candidate for election and had the legal right to hold the office of Treasurer of the State of Nebraska when Article IV, Section 2 of the Constitution of Nebraska provided that he would be ineligible to run for nomination and election to any other

State office if the office which he held as a State Railway Commissioner of the State of Nebraska was an office of the Executive Department under the pertinent provisions of the Constitution of the State of Nebraska.

3. The question whether the Petitioner was denied due process of law under the provisions of the Fifth Amendment and/or the Fourteenth Amendment, Sections 1 and 2, to the Constitution of the United States of America by the decision and judgment of the Supreme Court of Nebraska in which it was declared that Petitioner was not entitled to holdover in the office of the Treasurer of the State of Nebraska, for the reason that Respondent was not ineligible to file for nomination, to be duly elected and to assume and take possession of the office of State Treasurer even though he was a duly elected, qualified and acting member of the State Railway Commission during the time of his filing as such candidate, during his purported election, and at the time of his installation into said office; that this decision and judgment presents a federal question reviewable by Petition for Writ of Certiorari which is a question of substance.

4. The question whether or not it is inherent in our type of Republican form of government, as applied to the States of the Union and as provided in Article 4, Section 4 of the Constitution of the United States, that there be only three branches of state government consisting of the Executive, Legislative and Judicial. This proposition presents a federal question reviewable by Writ of Certiorari in view of the Decision and Judgment entered by the Supreme Court of the State of Nebraska in the case at bar.

E. Provisions of Constitution of United States and Acts of Congress and Constitution of Nebraska involved and citations thereof.

Article I, Section 1 of the Constitution of the United States.

Article II, Section 1 of the Constitution of the United States.

Article III, Section 1 of the Constitution of the United States.

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The Enabling Act by Congress of United States approved by President on April 19, 1864.

Act of Congress of Admission of Nebraska to Statehood, dated February 9, 1867.

Article II, Section 1 of the Constitution of Nebraska.

Article V, Section 19A of Amended Constitution of Nebraska of 1875.

Article IV, Section 20 of Constitution of Nebraska, Amended 1919 and 1920, as Result of State Constitutional Convention.

Article V, Section 26 of Constitution of Nebraska of 1875.

Article IV, Section 1 of Constitution of Nebraska.

SEE Appendix for Full Text of Constitutional Provisions and Acts of Congress.

F. Statement of case and facts material on questions presented.

Relator was a duly elected, qualified and acting commissioner of the State Railway Commission since on or

about January 3, 1963. He was still such commissioner when he filed for the office of Treasurer of the State of Nebraska, on October 27, 1965, subsequently held said office on November 8, 1966, when the general election was held and also on January 3rd and 4th, 1967, when the votes were canvassed by the State Legislature and on January 5, 1967, when he was sworn in and demanded the office of State Treasurer from Respondent, Fred Sorensen, who had been the duly elected, qualified and acting Treasurer having held the office of Treasurer of the State of Nebraska since assuming office on January 7, 1965. Respondent held over the office as such incumbent after January 5, 1967, on the grounds that Relator was ineligible to be a candidate in the primary election, to have his name placed on the ballot for the general election and to be determined to be duly elected by the Legislature; that further, he was ineligible to take the oath of office and otherwise qualify and hold the office of the Treasurer of the State of Nebraska. Resulting from such ineligibility, the office of State Treasurer was required to be held by Respondent as a holdover, incumbent until the next general election which could not be held according to law for another four years and until 1970. Relator as a duly elected, qualified and acting State Railway Commissioner was an officer under Article IV, Executive Department, of the Constitution of Nebraska and performed some legislative, some quasi-judicial and some executive departmental duties as an agency of the State Government as set out and discussed in:

In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276.

State ex rel Mortensen v. Furse, 89 Neb. 652, 131 N. W. 1030, 1031.

Petersen v. Beal, 121 Neb. 348, 237 N. W. 146.

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Application of Yellow Cab Company, 175 Neb. 150, 120 N. W. 2d 922.

State ex rel Taylor v. Hall, 129 Neb. 669, 170 N. W. 173.

State ex rel. Quinn v. Marsh, 141 Neb. 431, 3 N. W. 2d 892.

In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418.

State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

Under Article IV, Sections 1 and 2, Relator, as State Railway Commissioner, held an office of the State Railway Commission which was included as an agency of the Executive Department of the State government with duties that were legislative, quasi-judicial and executive; that under the recent holding of the Supreme Court of Nebraska in the case of *In re Application of Yellow Cab,* 175 Neb. 150, 120 N. W. 2d 922, the Nebraska State Railway Commission was included in the term "agency" set out in title LB 362, Laws 1959, Chapter 456, Page 1510.

G. When federal questions were first raised in trial and appellate courts.

The federal question was developed in the Petition for quo warranto filed by Relator against Respondent and the answer and cross-petition of Respondent filed stating defenses and affirmative relief prayed for by Respondent

against Relator. Such federal question presented itself in that the amendment, designated as Article V, Section 19a, to the Constitution of Nebraska in 1906 had been placed under the general heading "Executive" of said Constitution of Nebraska. The creation and establishment of the State Railway Commission, a part of the Executive Department of the Constitution, was brought about when such amendment was approved by the people of the State of Nebraska in the general election of 1905. Such amendment of the Nebraska Constitution was approved and adopted in the 1919 and 1920 Constitutional convention when the proposition was considered of retaining the State Railway Commission as a part of the Executive Department of the Nebraska Constitution. Relator alleged he was eligible because the State Railway Commission was not a part of the Executive Department of the Nebraska Constitution at the date that he filed as a candidate for this office but was a separate department of the Republican form of Government.

H. Argument supporting reasons relied on for allowance of writ.

Petitioner does not argue nor concede that the Nebraska State Railway Commission does not have internal due process, but only as to the Nebraska Supreme Court holding that the Railway Commissioner is an independent department of government which denies a due process external to the actual workings of the Commission. In this case, Petitioner has been denied the checks on elections as provided by the Nebraska Constitution at Article IV, Section 2 for certain executive offices. The Nebraska Supreme Court's Decision and Judgment herein also ef-

fectively denies Petitioner the checks and due process of both the Federal and the State Constitution of Nebraska designated to the Judicial or Legislative branches of our government.

The Nebraska Supreme Court in its decision in the instant case pointed to cases for support which recognized that a state governmental body may have powers characteristic of more than one of the three departments of government, which the United States Supreme Court itself has recognized when it stated, to wit:

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 612, 81 L. Ed. 835, 57 S. Ct. 549.

But saying that a department has not strictly the powers of any one branch is not the same as saying that the State Railway Commission is not a part of either the Executive or the Legislative or the Judicial Branch of the State Government but is an independent part of the Constitution of Nebraska which results in a denial of due process through the Fourteenth Amendment to the Constitution of the United States of America in that the inherent checks and balances of the Republican form of government, Article IV, Section 4, Constitution of United States, are done away with.

Both the United States Supreme Court and the Nebraska Supreme Court have recognized not only the inherent guarantee of the protections of a three branch government, but also that the United States and the Nebraska Constitutions provide for such.

In *Kilbourn v. Thompson,* 103 U. S. 168, 190, 191, 26 L. Ed. 377, Mr. Justice Miller said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. * * *"

In *O'Donohue v. U. S., ct. cl,* 53 S. Ct. 740, 289 U. S. 516, 77 L. Ed. 1356, 1361, Mr. Justice Sutherland for the court wrote:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments, the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Phillippine Islands,* 277 U. S. 189, 201, 72 L. Ed. 845, 849, 48 S. Ct. 480, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is nonetheless apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain

functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan."

In re Integration of Nebraska State Bar Association, 133 Neb. 283, 275 N. W. 265, 266 (1937):

"The Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because 'It is fundamental principle of constitutional law that each department of government, whether federal or state, "has, without any express grant, the inherent right to accomplish *all objects naturally within the orbit of that department,* not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." 1 Andrews' American Law (2nd Ed) § 182, p. 221.' In Matter of Richards, 333 Mo. 680, 67 S. W. 592, 594, 90 Am. St. Rep. 430, the Missouri court aptly stated the rule in the following language: 'All governmental powers are in their natures either legislative, executive, or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned.'"

In *Searle v. Yensen,* 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257, in which the constitutionality of a statute was challenged, the court said:

> "The division of governmental powers into executive, legislative and judicial in this court is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquier that 'there can be no liberty * * * if the power of judging be not separated from the legislative and executive powers.' * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor. In fact, the above proposition is declared in direct language by section 1, Article II of our Constitution: 'The powers of the government of this state are divided into three distinct departments, the legislative, the executive and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted.' "

And in *State ex rel. Mortensen v. Furse,* 89 Neb. 652, 131 N. W. 1030, 1031, the Nebraska Supreme Court itself said:

> "* * * We agree with counsel for relator that the office of Railway Commissioner is, under the Constitution, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument. In re Railway Commissioner, 15 Neb. 679, 50 N. W. 276. * * *"

Finally, it is evident that both procedural due process and substantive due process are issues here. The fact that pro-

cedural due process and checks which are applicable to any of the three branches of government are not applicable to the Railway Commission, in effect results in a deprivation of either liberty or property, or both, depending on whether the right to an elective office is looked upon as a right inherent in freedom or a right of property because of the accompanying salary of the office.

The authorities of Nebraska have been well established that such state officers as the Relator were ineligible, during the term of office for which they were elected such as State Railway Commissioner, to be capable of being elected or to hold such an office as the office of Treasurer of the State of Nebraska for a succeeding term because it is provided in Article IV, Section 2 of the Constitution of Nebraska that "none of the officers mentioned in the article shall be eligible to any other office during the period of time for which they have been elected. * * *" *State v. Waite,* 95 Neb. 806, 146 N. W. 1048; *Howard v. Marsh,* 149 Neb. 750, 21 N. W. 2d 503; *State v. Boyd,* 31 Neb. 682, 48 N. W. 739, 51 N. W. 602, 143 U. S. 135, 12 S. Ct. 395, 36 L. Ed. 103; *State v. Boyd,* 34 Neb. 435, 51 N. W. 964.

Respondent, Fred Sorensen, is required by law to hold over in his office as Treasurer of the State of Nebraska "until his successor is elected and qualified" under and pursuant to Article XIV, Section 1 of the Constitution of Nebraska and as construed by the Supreme Court of Nebraska in the cases of *State v. Moore,* 61 Neb. 9, 84 N. W. 399, and *State v. Boyd,* supra.

The aforementioned provision shown as Article XIV, Section 1 of the Constitution of Nebraska at the time that

the foregoing cases were ruled on in that regard has been changed with reference to the number of the Article in said Constitution. At the time concerned in the instant case which covered the years of 1963, 1965, 1966 and 1967 the pertinent provision in the Constitution of Nebraska with reference to a State elected officer holding over his term "until his successor is elected and qualified" was and is now designated as Article IV, Section 1, Constitution of Nebraska. In the instant case the Respondent, Fred Sorensen, as Treasurer of the State had that duty and obligation. In the last sentence of the first paragraph of said Section 1 it is provided that:

> "The Attorney General, Secretary of State, Auditor of Public Accounts, and the Treasurer shall be chosen at the general election held in November, 1958, * * * and their term of office shall be two years and until their successor shall be elected and qualified."

In the case of *State v. Boyd,* 31 Neb. 682, 48 N. W. 739, 51 N. W, 602, the Supreme Court of Nebraska held that:

> " 'Until his successor is elected and qualified', imposes the duty upon incumbent Governor to hold over until his successor is elected and qualified."

It follows in the instant case, that the Relator, Wayne R. Swanson, being ineligible to hold the office of Treasurer because he was already the holder of the State office of Railway Commissioner, had not been duly "elected" to said office of Treasurer and that the Respondent, Fred Sorensen, had a duty under the Constitution of Nebraska to hold over in said office until the next general election and until his successor was elected and qualified.

State v. Boyd, supra.

The question arises now as to the meaning of the word "eligibility" in such cases as the one at bar and in the consideration of such a case as this it is believed that this word is of paramount importance in the comprehensive consideration of this case. The Supreme Court of Nebraska defined the meaning of this word in the case of *State v. Waite,* 95 Neb. 806, 146 N. W. 1048, which was a case similar to the instant case in which Article V, Section 2 of the Constitution, now Article IV, Section 2 of said Constitution was being considered by the Court. In that case the Court said, to-wit:

> "The Constitutional provisions that none of the officers of the executive shall be eligible to any other state office during the period for which they shall have been elected makes the Lieutenant Governor, during the term for which he was elected ineligible to be elected to the office of Governor for the succeeding term. Article V, Section 2 providing that 'none of the executive officers of the executive department shall be eligible to any other state office during the period for which they may have been elected, the word "eligible" means capable of being elected to office, as well as capable of holding office.' "

Obviously the Respondent herein, Wayne R. Swanson, who was an incumbent Railway Commissioner of the State at all times considered in the instant case, could not possibly be eligible under this definition of the word nor could he be so considered by the Unicameral Legislature of the State of Nebraska, which Body has the duty of canvassing said votes of State officers, as provided at Article IV, Section 4 of the Constitution. The Legislature had enacted Section 32-1001.01 and Section 32-1001.02, R. S. Supp., 1965 into law by virtue of which contests of elections of certain

State officers were to be decided by the Supreme Court of the State of Nebraska but this Court held in the case of *Sorensen v. Swanson,* 181 Neb. 312, 50 S. C. J. 205, that these sections were unconstitutional. Hence, in view of said decision Article IV, Section 4 of the Constitution is the current law. It is provided in this Section, among other things, that:

> "The returns of every election for the officers of the executive department shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the Legislature, who shall immediately after the organization of the Legislature, and before proceeding to other business, open and publish the same in the presence of a majority of the members of the Legislature, the person having the highest number of votes for either of said offices shall be declared duly elected; * * *. The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law."

It is noted at page 10 of the certified transcript herewith that the Secretary of State of Nebraska certifies on January 5, 1967, to the Seventy-Seventh Legislative Session (in care of the Speaker) that among other "Officers Elected at the 1966 General Election was Railway Commissioner, Second District, James F. Munnelly. To the knowledge of this briefer there are no other provisions in the Constitution of Nebraska which provides specifically for the canvass of returns of candidates for the Railway Commission. Section 32-4.110, R. R. S., 1943, states that:

> "The votes cast for the officers of the executive departments of this state and members of the Nebraska State Railway Commission, shall be canvassed by the Legislature at its next regular session."

This is in apparent conflict with the grant given to it by the people to canvass votes as provided at said Article IV, Section 4 of the Constitution. It appears when considering the several cases cited herein in regard to the proposition as to whether the Railway Commission is a part of the Executive, together with the fact that its duties, membership, terms and powers are set out at Article IV, Section 20 under the general title "Executive" of the Constitution, that until the decision of the Supreme Court of Nebraska in the instant case, that it was definitely considered to be an agency or a part of the Executive department of the government of the State of Nebraska.

I. Opinions.

Copies of all opinions are appended to this petition by reference that were delivered by the Supreme Court of Nebraska in rendering both its original judgment and decree of January 27, 1967, and overruling the motion for rehearing thereon on March 10, 1967, and may be found in certified transcript filed herein at pages 73 to 85 and 91.

J. Judgments.

Copies of judgment and decree entered in the Supreme Court of Nebraska are appended to this petition by references that were entered respectively on January 27, 1967, order overruling Application for Stay of Judgment and Mandate, dated February 24, 1967, and order overruling Motion for Rehearing on March 10, 1967. See certified transcript filed herein at pages 74, 90 and 91.

CONCLUSION

WHEREFORE, SAID PREMISES CONSIDERED, Petitioner respectfully prays that this honorable court enter an order accepting this petition for writ of certiorari to Supreme Court of Nebraska and review the decision of said court in said quo warranto proceedings of January 27, 1967, and the order of said court subsequently entered overruling petitioner's Motion for Rehearing on March 10, 1967, reverse said judgment and decree and said Order overruling said Motion for Rehearing on the basis that the Supreme Court of Nebraska committed reversible error in determining, declaring, and ordering that Respondent, Wayne R. Swanson, was eligible to be a candidate and/or be elected to and be permitted to assume, qualify for and take possession of the Office of Treasurer of the State of Nebraska and to further reverse said judgment and decree on the basis that reversible error was had in ruling that Petitioner was not a hold over, incumbent State Treasurer and should be ousted from the Office of State Treasurer and Respondent placed in possession of said office and for all other legal and equitable relief to which Petitioner is entitled in the premises.

Respectfully submitted,

FRED SORENSEN, Petitioner,

By RALPH R. BREMERS,
312-14 W. O. W. Building,
Omaha, Nebraska, and

WILLIAM L. WALKER,
636 Stuart Building,
Lincoln, Nebraska,

His Attorneys.

APPENDIX

APPENDIX I.

JUDGMENT OF SUPREME COURT OF NEBRASKA, DATED JANUARY 27, 1967

And afterwards, to-wit, on the 27th day of January, 1967, there was rendered by said Supreme Court of Nebraska and entered upon Journal UUU thereof, at page 488, a certain Judgment in the words and figures following, to-wit:

SUPREME COURT OF NEBRASKA
JANUARY TERM, A. D. 1967

Original No. 36570—January 27

WAYNE R. SWANSON, Relator,

vs.

FRED SORENSEN, Respondent.

This cause coming on to be heard upon the petition and pleas was argued by counsel and submitted to the court; upon due consideration whereof, the court finds that the respondent is guilty of intruding into the office of State Treasurer and of unlawfully holding and exercising the same, as charged in the petition.

It is, therefore, considered by the court that the respondent be, and he hereby is, ousted and altogether excluded from said office and from all its privileges and emoluments and that he forthwith deliver to the relator all of the books, papers and property belonging to said office and that the relator recover from the respondent his costs in this action, taxed at $——; for all of which execution is hereby awarded.

APPENDIX II.

OPINION OF SUPREME COURT OF NEBRASKA IN ORIGINAL ACTION NO. 36570, DATED JANUARY 27, 1967.

SWANSON vs. SORENSEN

36570 Filed January 27, 1967

1. In adopting the constitutional provision creating the State Railway Commission, it was made an independent part of the Constitution of Nebraska and not as an amendment to the executive, legislative, or judicial articles thereof.

2. Wayne R. Swanson determined to be the duly elected and qualified Treasurer of the State of Nebraska.

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, JJ.

SPENCER, J.

Relator, Wayne R. Swanson, was granted leave to file an original action in quo warranto in this court against respondent, Fred Sorensen. Relator, while serving as a duly elected State Railway Commissioner, filed as a candidate for the office of State Treasurer, secured the Republican nomination, and was duly elected over respondent, the Democratic nominee who was the incumbent. Relator was declared elected and qualified by filing a bond and taking the oath, but respondent upon demand has refused to vacate the office.

There is on file herein a demurrer to the petition, a separate demurrer, an answer and cross-petition, and a motion for summary judgment. There is no fact issue for consideration. We do not deem it necessary to consider any of the procedural questions, and direct our attention solely to the basic issue herein, the eligibility of the relator.

It is the contention of the respondent that the relator as a railway commissioner is an executive state officer and as such was disqualified from filing for the office of State Treasurer and is ineligible to accept said office. Respondent's contention is premised on the conclusion that the Nebraska State Railway Commission is created by Article IV, Section 20, Constitution of Nebraska, and since Section

20 is a part of Article IV, the railway commissioners fall within the prohibition of Section 2 of said Article IV.

Article IV, Section 1, Constitution of Nebraska so far as material herein, provides: "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law."

Article IV, Section 2, Constitution of Nebraska, so far as material herein, provides: "None of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed, * * *." In the Constitution of 1875, this provision was Article V, Section 2, and read: "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected." The present wording was adopted in 1920. This amendment was probably deemed essential because Section 1 at that time was broadened to include the heads of such other executive departments as may be established by law.

The history of Article IV, Section 20, Constitution of Nebraska, is pertinent to the determination of the question involved. In 1883, the Legislature addressed an inquiry to this court asking whether railway commissioners would be executive state officers and if the Legislature could legally create such office. The court determined that the duties of the office would be executive and that the Legislature was without power to create a new executive state office. See In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276.

In 1905 the Legislature by joint resolution submitted a constitutional amendment creating the office of State Railway Commissioner. Laws 1905, c. 233, s. 2, p. 791. This section was adopted on November 6, 1906, and was incorporated into the Session Laws of 1907 as a separate amend-

ment to the Constitution of Nebraska. Laws 1907, p. 46. It was carried as a separate section of the Constitution until the issuance of the Session Laws of 1913. At that time, it appeared as Article V, Section 19A, Constitution of Nebraska. Laws 1913, p. 24. Article V covered the executive department and is Article IV of the present Constitution. This history is detailed in State ex rel. Shields v. Hall, 103 Neb. 17, 170 N. W. 173. No amendments to this section were proposed by the Constitutional Convention of 1919 and 1920, although the specific point of the inclusion of the State Railway Commissioners in the enumeration of officers in Section 1 was considered. It was adopted, and subsequently abandoned. The section was not amended until 1962, and that amendment is not pertinent to the present question.

Article IV, Section 20, Constitution of Nebraska, as originally adopted, reads as follows: "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

This section was amended in 1962 to provide for not more than seven and not less than three commissioners, and to provide for their election from districts rather than at large, but in other respects remained essentially the same.

While In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276, is not a decision of this court in the tech-

nical sense of the term, in 1911 in State ex rel. Mortensen v. Furse, 89 Neb. 652, 131 N. W. 1030, this court said: "We agree with counsel for relator that the office of railway commissioner is, under the constituiton, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument."

In 1919, this court had before it In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192, in which questions were raised as to the extent and the limits of the jurisdiction and the authority of the State Railway Commission, particularly as relating to legislative and judicial powers. In that case, we held: -"In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and was not designated as an amendment to the executive, legislative or judicial articles of the Constitution. The fact, therefore, that it has, by the compilers, been placed in article V, which relates to the executive department of the government, affords no assistance in its construction. Its language is clear, as follows: 'There shall be a state railway commission, consisting of three members, who shall be first elected, at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature.' Its powers and duties include 'the regulation of rates, service and general control of common carriers.' The legislature may make provision as to these powers and duties, but the commission, 'in the absence of specific legislation, shall exercise the powers and perform the duties enumerated.' It was submitted to the people by the legislature of 1905. Laws 1905, ch. 233. Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise. While this power must be exercised in harmony with the

provisions of the federal Constitution, and the general provisions of our own Constitution that affect all branches of the government, it is plainly not limited by the special provisions of the Constitution which distinguish between the legislative and judicial departments of the government. The functions of this commission are largely administrative, but, as is stated in Prentis v. Atlantic Coast Line Co., supra (211 U. S. 210), the commission necessarily has independent legislative, judicial, and executive or administrative powers."

In Petersen v. Beal, 121 Neb. 348, 237 N. W. 146, we held: "This court is committed to the view that, 'In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative or judicial articles thereof.' In re Lincoln Traction Co., 103 Neb. 229."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we reaffirmed this position. In that case, involving the scope of the review in this court of an action of the railway commission, administrative or legislative in nature, we said: "* * * appellants confuse the administrative, legislative, and judicial field of action. In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative, or judicial articles thereof. In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192."

A hasty search would indicate our last statement on this point is found in State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1. There we said: "In this connection, Section 20, Article IV, of the present Constitution shows the creation of the State Railway Commission, providing for the election of the commissioners, length of term to be served by the commissioners, and the powers and duties of the commission. It is a constitutionally created body, as distinguished from an executive department or commission created by the Legislature."

For the last 48 years this court has been committed to the view that in adopting the constitutional provision creating the State Railway Commission, it was made an independent part of the Constitution and not as an amendment to the executive, legislative, or judicial articles thereof. To discredit those holdings at this late date by deciding that railway commissioners are embraced within the exclusion of executive officers in Article IV, Section 2, Constitution of Nebraska, merely because compilers of the Statute have seen fit to place Section 20 in Article IV, would be to ignore the realities of the situation and to open a pandora's box of future trouble because of the impact of the previous holdings. The relator at all times was eligible to be a candidate for State Treasurer.

For the reasons given, Wayne R. Swanson is the duly elected and qualified Treasurer of the State of Nebraska, and respondent is hereby ordered and directed to deliver to the said Wayne R. Swanson all books and papers in his custody and under his control belonging to said office.

JUDGMENT FOR RELATOR.

APPENDIX III.

APPLICATION FOR STAY.

WAYNE SWANSON, Relator

vs.

FRED SORENSEN, Respondent.

Comes now the Respondent and respectfully shows to the Court that he desires to prosecute proceedings by appeal or Certiorari, to the Supreme Court of the United States of America, from the decision and judgment rendered in the above captioned case by this honorable Court on the 27th day of January, 1967. That Respondent hereby offers to give a bond in such amount and containing such conditions as the Court may specify as a condition for the granting of said stay.

Wherefore, the undersigned prays for an order staying the issuance of the judgment and mandate of this Court during the pendency of said proceedings in the Supreme Court of the United States of America.

Dated this 13 day of February, 1967.

Fred Sorensen, Respondent,

By (Sgd.) Ralph R. Bremers,

For: William L. Walker,

636 Stuart Bldg.,
Lincoln, Nebr.

Ralph R. Bremers,

312 W. O. W. Bldg.,
Omaha, Nebraska,

Attorneys for Respondent.

(Application for Stay was overruled by the Supreme Court of Nebraska.)

APPENDIX IV.

MOTION FOR REHEARING AND ORDER OF SUPREME COURT OF NEBRASKA OVERRULING RESPONDENT'S MOTION FOR REHEARING, DATED MARCH 10, 1967.

And afterwards, to-wit, on the 10th day of March, 1967, there was rendered by said Supreme Court of Nebraska, and entered of record upon Journal UUU thereof, at page 554, a certain order in the words and figures following, to-wit:

SUPREME COURT OF NEBRASKA

JANUARY TERM, A. D. 1967

Original No. 36570

WAYNE R. SWANSON, Relator,

vs.

FRED SORENSEN, Respondent.

This cause coming on to be heard upon motion of respondent for a rehearing was submitted to the Court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

APPENDIX V.

PROVISIONS OF CONSTITUTION OF UNITED STATES AND CONSTITUTION OF NEBRASKA AND ACTS OF CONGRESS AND CITATIONS THEREOF.

The constitution of the United States in *Article I, Sec. 1,* provides that,

> "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of Senate and House of Representatives."

Article II, Sec. 1, provides:

> "The executive power shall be vested in a President of the United States of America."

Article III, Sec. 1, provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress from time to time may ordain and establish."

The Enabling Act enacted by the Congress of the United States and approved by the President on April 19, 1864, in Section 4 provided:

> "Be it further enacted, That the members of the convention thus elected shall meet at the state capitol of said territory on first Monday in July next, and after organization shall declare, on behalf of the people of

said territory, that they adopt the constitution of the United States; whereupon the said convention shall be, and it is hereby authorized to form a constitution and state government; Provided; when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independence; and provide further that said constitution shall provide by an article forever irrevocable, without the consent of the congress of the United States."

Act of Congress of admission of the State provided as follows:

"Whereas, the congress of the United States did, on the ninth day of February, A. D. 1867, pass an act, in the following words, to-wit:

'An act for the admission of the state of Nebraska into the Union.'

"Whereas, On the twenty-first day of March, A. D. 1864, congress passed an act to enable the people of Nebraska to form a constitution and State government, and offered to admit said State, when so formed into the Union, upon compliance with certain conditions therein specified; and, whereas, it appears that the said people have adopted a constitution, which, upon due examination, is found to conform to the provisions, and comply with the conditions of said act, and to be republican in its form of government, and that they now ask for admission into the Union: Therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled, That the constitution and State government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified and confirmed, and that the said State of Nebraska shall be, and is hereby, declared to be one of the United States of America; and is hereby admitted into the

Union upon an equal footing with the original States, in all respects whatsoever."

Distribution of powers in the Constitution of Nebraska, is provided in Article II, Section 1, that:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

In 1905 Session of the Legislature of Nebraska, there was enacted, by joint resolution a bill amending the 1875 Constitution of Nebraska providing for State Railway Commission membership, terms and powers and same was submitted to the people in the general election of 1906 and duly adopted and was placed in and as a part of the Executive Department as Article V, Section 19A, and provided that:

> "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

In the Constitutional Convention of 1919 and 1920, after consideration of the members, said proposition which was identical to Article V, Section 19A, for the State Railway Commission, was readopted without change as Article

IV, Section 20, of the new Constitution of Nebraska which is the Constitution now in full force and effect in Nebraska, except as amended from time to time since 1920.

The Constitution of Nebraska in Article IV, Section 1, provided that:

> "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish. The Attorney General, Secretary of State, Auditor of Public Accounts, and the Treasurer shall be chosen at the general election held in November, 1958, and in each even-numbered year thereafter, and their term of office shall be two years and until their successor shall be elected and qualified."

and in Article IV, Section 2, it is provided:

> "No person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have attained the age of thirty years, and who shall not have been for five years next preceding his election a resident and citizen of this state and a citizen of the United States. None of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed, except that the Lieutenant Governor shall be eligible to be a candidate for Governor." (Amended, 1920, 1962)."

In Article IV, Section 26, Constitution of Nebraska, 1875, it is provided:

> "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers created."

APPENDIX VI.

CERTIFICATE OF SECRETARY OF STATE OF NEBRASKA RE PETITIONER'S BOND

STATE OF NEBRASKA
DEPARTMENT OF STATE

Frank Marsh, Secretary of State of the State of Nebraska does hereby certify that the attached is a true and exact copy of the bond of Fred Sorensen.

I further certify that said bond was filed in the office of Secretary of State on January 7, 1965, and is a matter of public record.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this Eleventh day of January in the year of our Lord, one thousand nine hundred and Sixty-Seven.

(SEAL) Frank Marsh,
Secretary of State

BOND FOR ELECTIVE OFFICIALS OF THE STATE OF NEBRASKA

(Form Approved by the Department of Insurance)

KNOW ALL MEN BY THESE PRESENTS: That we, Fred Sorensen, as Principal, and Lumbermens Mutual Casualty Co., a corporation organized under the laws of the State of Illinois, and authorized to transact business as a surety company in the State of Nebraska, as surety, are held and firmly bound, jointly and severally unto the State of Nebraska, in the penal sum of $1,000,000.00, for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns.

WHEREAS the above named principal has been duly elected to the office of State Treasurer of the State of Nebraska, for the term of 2 years, beginning on the 7th day

of January, 1965, and ending on the first Thursday after the first Tuesday in January, 1967, or until his successor has been duly elected and qualified.

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the principal shall faithfully perform all duties now or hereafter imposed on him by law, and shall honestly account for and pay over all money and property that may come into his hands in his official capacity during said term, then this obligation shall be void, otherwise it shall remain in full force.

If the stated term of the bond shall be reduced to a shorter term by reason of the death, resignation or removal from office of the principal for a cause not imposing liability on his bond, the surety shall refund, pro rata, to the State of Nebraska the unearned portion of the premium paid for the term of said bond.

Signed this 4th day of January, 1965.

Fred Sorensen,
Principal,

Lumbermens Mutual Casualty Company,
Surety.

By H. L. O'Brien,
Attorney-in-fact.

(Company Licensed, Agent Licensed, Department of Insurance, Jan. 6, 1964, Frank J. Barrett, Director.)

OATH

State of Nebraska, County of Lancaster, ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Nebraska, and will faithfully discharge the duties of State Treasurer according to the best of my ability, and that at the election at which I was chosen to fill said office, I have not improperly influenced in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing

from any corporation, company or person, or any promise of office, for any official act or influence. So help me God.

Fred Sorensen

Sworn to and subscribed before me this 4th day of January, 1965.

P. Merle Hinyhim,
Notary Public.

APPROVED AS TO FORM
ATTORNEY GENERAL
By Richard H. Williams,
Asst. Atty. Gen.

Filed Jan. 7, 1965, by Paul Quinlan, Deputy.

APPENDIX VII.
CERTIFICATE OF GOVERNOR OF NEBRASKA THAT RESPONDENT HAS NOT RESIGNED AS RAILWAY COMMISSIONER

STATE OF NEBRASKA
Executive Office
Lincoln

CERTIFICATE

NORBERT T. TIEMANN, Governor of the State of Nebraska, DOES HEREBY CERTIFY, pursuant and in accordance with Sections 25-1280 and 25-1282, R. R. S. 1943, that there is no record in the office of the Governor of the State of Nebraska that shows that Wayne R. Swanson, since January 3, 1963, and extending to date of execution of this Certificate, tendered, offered or filed his resignation as State Railway Commissioner of the State Railway Commission of Nebraska, to either former Governor Frank B. Morrison or to the undersigned, Norbert T. Tiemann; and

FURTHER, THE UNDERSIGNED CERTIFIES that Wayne R. Swanson as State Railway Commissioner of the State Railway Commission of Nebraska has not orally in

person, or in writing, offered, tendered or filed a resignation from said State Office of State Railway Commissioner with the undersigned Norbert T. Tiemann in accordance with and pursuant to Section 32-1039, R. R. S. 1943, or otherwise on or since January 5, 1967.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Nebraska. Done at Lincoln, this 20th day of January, in the year of our Lord, one thousand nine hundred and sixty-seven.

Norbert T. Tiemann,
Governor of the State of Nebraska.

ATTEST:
Frank Marsh, Secretary of State.